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The procedures of a regime of admission to the European borders by citizens of third countries: rules, exceptions, limits and new paths of European integration in migration policy

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Abstract: The present paper aims to give some reflections on the border procedures as they have been created with the new pact on asylum and immigration, thus affirming an admission regime, that is based on the regularity of a stay of a citizen, who belongs to a third country to request through the application for international protection the relative entry to the territory. The status of the third country citizen, who requests the admission regime, is based on legal fictions of non-presence of the foreigner at the border and as a decrease in the number of foreigners, who in recent years have been increased in the European context with clandestine and/or regular way. The practice has now matured and with the help of the jurisprudence of the ECtHR the new pact will be examined, evaluated towards

new paths oriented for the greater protection and/or not of citizens of third countries in the European context.

Keywords: admission; border procedure; expulsion; asylum; de facto detention; Schengen Borders Code (SBC); ECHR; ECtHR; fictio iuris; non-refoulement; transit zones; unathorised person; border cases; assessment phases.

Introduction

In 2020 the Council approved a new pact on migration and asylum, which aimed to provide a comprehensive framework in this area[1]. The main objective was to address and protect European borders together with a procedure for an entry on subjects, who satisfy the entry and verification of international protection, thus distancing the entry into the territory from asylum seekers, beneficiaries of international protection. A border procedure regulates, verifies, replaces the old directives arriving at a repatriation at the border[2].

1COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL COMMITTEE AND THE COMMITTEE OF THE REGIONS on a New Pact on Migration and Asylum. COM/2020/609 final: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52020DC0609

2Regulation(EU) 2024/1352 of the European Parliament and of the Council of 14 May 2024 amending Regulations (EU) 2019/816 and (EU) 2019/818 for the purpose of introducing the screening of third-country nationals at the external borders. PE/22/2024/REV/1. OJ L, 2024/1352, 22.5.2024: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1352; Regulation(EU) 2024/1348 of the European Parliament and of the Council of 14 May 2024 establishing a common procedure for international protection in the Union and repealing Directive

The tools used have to do with the pre-entry that evaluates, verifies the legal status of the citizen to a third country, as holder of entry into the territory of the Union and as an application of procedures to a regulatory framework that accompanies the proposal of the Regulation that was established by the Commission as an objective of reforms that address the problem that harmonizes the systems of asylum, reception, repatriation of the Member States as a reason for the tools within the form of the regulation[3].

The border procedure aimed to avoid a fictio iuris based on the physical presence of the person on the territory and the authorization as a formal act to those who enter to remain in the European territory.

This is a prerequisite that created a regime of non-admission compared to the regularity of the stay of the procedures that applied to the subjects who have formally received entry into the territory at the borders, as a decrease in access to the fundamental rights reserved for these subjects.

2013/32/EU. PE/16/2024/REV/1. OJ L, 2024/1348, 22.5.2024: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ%3AL_202401348; Regulation(EU) 2024/1349 of the European Parliament and of the Council of 14 May 2024 establishing a return border procedure, and amending Regulation(EU) 2021/1148. PE/17/2024/REV/1. OJ L, 2024/1349, 22.5.2024: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32024R1349

3Amended proposal for a Regulation OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU. COM/2020/611 final: https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:52020PC0611

The time has come for a well-articulated system established as an admission regime that includes its own prerequisites and consequences. This category comprise instruments of international law, the European space and from the jurisprudence of the European Court of Human Rights (ECtHR). The new pact establishes a modern procedure based on elements of a new reality in the European borders as legal consequences where the new regime is a procedure for international protection that deprives the personal freedom of third-country nationals and removal outside the borders.

Towards the authorization to enter the European territory

International practice has laid the foundations to a principle concerning the admission of a foreigner into a state. A rule where the admission of foreigners began its journey from the Geneva Convention on the status of refugee which included provisions for admitting asylum seekers to foreign territories without rejecting them (Īneli-Ciger, 2018).

The criteria according to the EU are those to protect the right to asylum, the principle of non-refoulement, the set of rules as a subjective right that is full and accesses to specific categories of people (Gortazar, 2001; Cholweinski, 2002; Thym, 2022).

The first limits are those provided by international law that discretionarily refuses the entry to a foreign person(Costello,

Foster, 2015).

Admission to the territory through the relative authorization has a personal dimension and a territorial one pre-established as application to people who arrive at the border without an official authorization and waiting for the acquisition of a status (Basaran, 2011).

Territory as a second requirement has to do with the regulations, the transit zones, the border zones, the waiting zones and the state borders.

Some states have created zones for foreigners that are reminiscent of stories from the past in Europe. For example, in France we recall art. L341-6 of the Code de l'entrée et du sejour des étrangers et du droit d'asile (CESEDA) where it allows the foreigner who has arrived and who crosses the border by train, ship and/or plane to find a place in zones that will evaluate their admissions to French territory.

Art. L4341- 7 CESEDA also sought:

"(…) the waiting area extends beyond its place of origin, including all those places "in which the foreigner must be present both in the context of the current procedure, and in cases of medical necessity" (…) the waiting area abandons its territorial dimension, adhering to the person of the foreigner who, as long as he is subjected to the procedure for evaluating his right to enter the territory, will be considered fictitiously still "in limine" (...)"[4].

Faced with a regime of non-admission that is distinct from expulsion, the foreigner refuses entry to the territory following a precise treatment at the border that can also lead to refusal of

4CESEDA, artt. L341-1 à L341-7: https://www.legifrance.gouv.fr/codes/article_lc/LEGIARTI000042777111

entry, rejection at the border, the difference between expulsion and an appeal that does not necessarily mean being immediately suspended. Thus, foreigners who are not admitted find themselves in a territory subjected to an expulsion procedure, removed by simplified procedures that do not require other formalities and guarantees (Charaudeau Santomauro, 2022)[5].

The fictio iuris aims to separate the physical presence from that of legality, of admission that has been refused. The aim of the fiction of non-entry was to create a limiting space (Soderstrom, 2022) that also involved the control procedures, of evaluation for the relative entry requirements in its foreigners as a legal space (Burchard, 2022) that thus allow states to support, oblige, guarantee foreigners the limits as bases that attribute the territory to a positive evaluation according to the entry requirements in their territory.

The fictio iuris of non-entry as formal admission by the authorities and the possible entry of authorization confers to a legal regime from the moment the foreigner not admitted and awaiting admission has a status on the territory.

In this way, a particular regime is established as an exception that reaches an ownership that enters the territory. Its effects have to do with the rights that protect the irregularity of subjects, who express their will to international protection thus exploiting the entry into its territory. The physical and legal

5CESEDA, artt. L. 332-1 a L 332-3.

presence of a regime establishes in its territory a precise state for the borders applicable to irregular foreigners. A regime where the asylum procedure rejects the procedural guarantees without excluding the areas from a national jurisdiction (Battjes, 2017).

This type of strategy does not find a basis in the functional jurisdiction of the state on the borders where the exclusion of subjects from territories leads to the discussion of the responsibility of the state for the application of a regime to subjects who are irregular, i.e. not admitted.

Clarifications and precisions from the jurisprudence of the ECtHR

By carefully studying the jurisprudence of the ECtHR, what is immediately understood is the relative prohibition to the person to enter a territory. Refusing the entry to a person means finds himself in a regime contrary to Art. 3 ECHR due to the removal of a person, a family member, etc. A state allows access to its territory in a provisional manner by evaluating firstly the relative protection of its borders[6].

This is a fictio iuris that gives the possibility to states to manipulate the jurisdiction on transit zones, border areas through operational borders and extraterritoriality.

6ECtHR, decision of 23 July 2020, n. 40503/17, 42902/17, 43643/17, M.K. and others v. Poland, par. 166 ss.

In N.D. and N.T. case is immediately noticeable that Spain has put in the forefront the territorial jurisdiction on the border with Morocco, as a system of fences, where according to a relative protocol of the Guardia Civil the border between Spain and Morocco is operational, which means that Spain had a restrictive jurisdiction for the control, the admission of citizens to third countries.

The ECtHR has stated, in this regard, that:

"(…) the special nature of the context as regards migration cannot justify an area outside the law where individuals are covered by no legal system (...) the Convention cannot be selectively restricted to only parts of the territory of a state by means of an artificial reduction in the scope of its territorial jurisdiction[7] (…) states cannot create spaces that are outside the law, where individuals are covered by no legal system capable of affording them the enjoyment of the rights and guarantees protected by the Convention (…)".

These were positions that we have also seen in other cases[8]. For example, in the Amuur v. France case, the ECtHR did not accept the issue of extraterritoriality of the area as a transit point at Orly airport, thus noting a legal vacuum that made the fictio iuris incompatible with conventional obligations[9].

Thus, the ECtHR has also put the possibility of applying a regime at the borders for the admission of foreigners as rights. These are cases that concern personal freedom, i.e. persons who arrive at the border irregularly and are asylum seekers or not at

7ECtHR, decision of 13 February 2020, n. 8675/15 e 8697/15, N.D. and N.T. v. Spain, parr. 109-110: decision of 21 November 2019, n. 61411/15, 61420/15, 61427/15, 3028/16, Z.A. v. Russia, par. 129.

8ECtHR, 12 February 2009, n. 2502/04, Nolan and K. v. Russia, par. 45; decision of 24 January 2008, n. 29787/03 and 29810/03, Riad and Idiab v. Belgium, par. 79.

9ECtHR, 25 June 1996, n. 19776/92, Amuur v. France, par. 52.

the forefront.

The ECtHR has not accepted state jurisdiction and the "blatant fictions of non-presence" (Cornelisse, 2004). The relative jurisprudence according to art. 5(1)(f) was linked to the relative authorised entry and to an ambiguity that did not concern the regulatory gaps of areas on its own state territory of application to a legal regime relating to rights such as that of personal freedom.

The detention of migrants at the borders thus expresses a sovereign prerogative of control and the relative entry of foreigners across its own borders through the status of detention.

In particular, art. 5(1)(f) stated that:

"(…) arrest or detention of a person prevents his effecting and unauthorised entry into the country (…)".

It refers to an unauthorised entry which we have noted as an expression from the ECtHR in many cases such as for example in the judgment Saadi v. United Kingdom, where it was stated that:

"(…) detention on entry, pending the application for asylum (…) the detention could not be justified by art. 5(1)(f) because the person did not intend to make an "unauthorised entry" (…) immediately applied for asylum and had consistently been cooperative with the authorities (…) intended to enter the territory in an unauthorised manner and was acting in good faith (...)"[10].

The detention was in accordance with Article 5(1)(f) of the ECHR, since the measure is intended to safeguard the sovereign power of Member States to decide whether to allow aliens to

10 ECtHR, decision of 29 January 2008, n. 13229/03, Saadi v. United Kingdom, par. 28, 65.

enter their territory under any conditions. This is a necessary adjunct to (their sovereign right to control aliens' entry and residence in their territory) states that are permitted to detain immigrants who have not applied for permission to enter, whether by way of asylum or not (O'Nions, 2008; Harta, 2018).

In reality, states enjoy the relative discretion to decide on the right to personal liberty for immigrants and cases of interference, so the detention was compatible with art. 5, par. 1, letter f).

The ECtHR also observes that:

"(…) detention of potential immigrants, including asylum-seekers, is capable of being compatible with article 5 § 1 (f) (…)".

In the Z.A. v. Russia case the same factors were not applied. In the case of detention of an individual,

"no other steps do exist than reacting to his or her wish to enter by carrying out the necessary verifications (...)"[11].

Thus, evaluating the detention according to the time that a subject has remained, one also recalls the Suso v. Malta and M.K. v. Hungary where in these cases the persons entered but were not authorised. Their detention was not considered justified by the framework of art. 5, par. 1, letter f) which in an excessive and prolonged manner verified the identity of the subject to ensure the procedure without causing further delays in time[12].

11 ECtHR, Z.A. v. Russia, op. cit., par. 44.

12 ECtHR, decision of 23 July 2013, n. 42337/12, Suso Musa v. Malta; decision of 4 May 2023, n. 26250/15, H.N. v. Hungary, parr. 6-10.

In the Dshijri v. Hungary case, the applicant submitted the relevant application for international protection, thus issuing a temporary residence permit for humanitarian reasons. This is an asylum procedure where the applicant is detained for four months. According to the same article of application, namely Art. 5, par. 1, letter f), the ECtHR stated that:

"(…) regard to the fact that the applicant was in possession of the aforementioned residence permit (…) the Court does not accept that in the present case the detention was meant to prevent an unauthorised entry into the country (...)"[13].

The person is thus a subject to a refusal of entry adopted by its own authorities, where detention according to par. f) is linked to removal[14]. This is a limit which is linked to family units and minors. The state in such cases assesses and controls the appropriateness of the relative detention of minors as demonstrable to other alternative measures.

Asylum at the Border. Regime and Procedure

Admission to the territory and the related authorization to enter according to the ECtHR have legal consequences on the state authorities and the personal freedoms of migrants according to art. 5, par. 2, lett. f). Derogatory admission as applicable to asylum and repatriation procedures and external borders are of an exceptional nature and applicable in a defined and limited

13ECtHR, decision of 23 February 2023, n. 21325/16, Dshjiri v. Hungary, par. 12.

14ECtHR, decision of 30 March 2023, n. 21329/18, J.A. and others v. Italy, par. 82.

manner. The new pact thus loses the scope of application of a subjective nature where the admission regime concerns areas of the international protection procedure, detention and rejection that are part of a particular protection.

Art. 43 of the Procedures Directive has laid the foundations for the border procedure[15], as an optional and non-mandatory procedure for Member States at the border, the transit zone of the Member State and in defined cases where the admissibility of the application for protection has to do with the admission to the territory of the state as a type of ordinary procedure.

The rule states that the border procedure is not authorized upon entry into the Member State within the limit of the four weeks. Thus, we can speak of a derogation of Art. 9 of the same Directive which allows the right to remain on the territory and to the applicants the relative protection for the procedure that determines their status until the first instance decision (Progin Theurekauf, Epiney, 2022).

Art. 9 applies to the border procedure, i.e. to applicants to remain in the transit zone and to the related restrictions of their freedom of movement (Cornelisse, 2016). Art. 3(1) of the Procedure Directive stated that:

"(...) applications for international protection lodged in the territory, including at the border, in the territorial waters or in the transit zones of the

15Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast). OJ L 180, 29/06/2013, p. 60–95: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex%3A32013L0032

Member States (...)".

This is an interpretation that is in line with and provided for by Art. 9, par. 2 which allowed a derogation from the law of its territory and in cases where:

"(...) the data subject makes a subsequent application pursuant to Article 41, or if they intend to surrender or extradite, where appropriate, a person to another Member State pursuant to obligations under a European or other arrest warrant, or to a third country, or to an international criminal court or tribunal (...)".

As a consequence, art. 9, par. 2 sought to lay the foundations for non-conferment of a right to receive a residence permit where persons seeking protection are governed by the relevant Schengen Borders Code (SBC)[16].

Art. 6(5)(c) of the SBC provided that third-country nationals did not fulfill the relevant entry conditions and were not authorised to enter the territory for humanitarian reasons of national interest and in accordance with international obligations. These are provisions of the SBC where the Regulation applied compliance with the principle of non-refoulement was detrimental to applicants for protection.

In this spirit and within the same framework, the CJEU in the ANAFE case stated that:

"(…) temporary residence permit or temporary residence authorisation is an indication that it has not yet been determined whether the conditions for entry into the territory of the Schengen area or for the grant of refugee status have been met (...)"[17].

16 Regulation(EU) 2016/399 of the European Parliament and of the Council of 9 March 2016 on a Union Code on the rules governing the movement of persons across borders (Schengen Borders Code) (codification). OJ L 77, 23.3.2016, p. 1–52: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32016R0399

Instead, in the Gnandi case the same court stated that:

"(...) asylum procedure is not equivalent to a right to obtain a residence permit, but guarantees that the status of the applicant for protection is not equated to that of an irregular migrant[18] (…) asylum seekers, even those subjected to the border procedure, do not enjoy a full right to entry and stay on the territory, equivalent to that which is instead attributed to those who have a residence permit as a result of a procedure (…) they have the right not to be expelled and not to be considered as irregular migrants pending the procedure for determining international protection (…)" (De Bruycker, Moraru, Renaudiere, 2016)[19].

With regard to personal freedom at the borders, Art. 8, par. 3, letter c) of the Reception Directive allowed the relative detention for the protection seeker according to the procedure, the right to enter its territory[20].

The same formulation is also found in Art. 43 of the Procedure Directive where it implied the relative need to resort to a form limiting freedom of movement (Cornelisse, Reneman, 2020), without leaving it to the Member States to decide on the relative measures that limited freedom of movement and deprived personal freedom.

It is specified that detention for protection according to Union law cannot be general and it should respect the relative

17CJEU, C-606/10, ANAFE of 4 June 2012, ECLI:EU:C:2012:348, published in the electronic reports of the cases, par. 68.

18CJEU, C-181/16, Sadikou Gnandi v. État belge (Gnandi) of 19 June 2018, ECLI:EU:C:2018:465, published in the electronic reports of the cases, par. 40.

19Recital n. 10 of the Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008, p. 98–107: https://eur-lex.europa.eu/eli/dir/2008/115/oj

20Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, op. cit.

requirements according to the proportionality adopted case by case and the restrictive measures that are adequate to the objectives pursued[21]. Thus, the relative detention and the border procedure according to the former Art. 43 of the Procedure Directive is also affirmed in the Commission v. Hungary case and in theFMS case[22]. In the M.A. case according to the Court, Member States did not withhold protection from the applicant based on the logic that the individual had entered their territory irregularly[23].

Border cases. Choice for rejection at the border

The Non-Entry and the return Directive lay the foundation for any third-country national present in the territory of a Member State to return[24].

The return Directive allows its states not to apply provisions for border cases that consider third-country national and non-admitted countries to their territory as an exception that is

21CJEU, C-534/11, Arslan of 30 May 2013, ECLI:EU:C:2013:343, published in the electronic reports of the cases

22CJEU, joined cases, C-924/19 PPU and C- 925/19 PPU, Országos Idegenrendeszeti Főigazgatóság Dél-alföldi Regionális Igazgatóság of 14 May 2020, ECLI:EU:C:2020:367, published in the electronic reports of the cases, par. 236. C-808/18, European Commission v. Hungary of 17 December 2020, ECLI:EU:C:2020:1029, published in the electronic Reports of the cases, par. 149.

23CJEU, C-72/22 PPU, M.A. of 39 June 2022, ECLI:EU:C:2022:505, published in the electronic reports of the cases, parr. 56 ss.

24Commission Recommendation (EU) 2017/2338 of 16 November 2017 establishing a common 'Return Handbook' to be used by Member States' competent authorities when carrying out return-related tasks. C/2017/6505. OJ L 339, 19.12.2017, p. 83–159: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32017H2338

provided for in art. 2, par. 2, letter a) and by third-country nationals who are rejected at the border under Article 14 of the Borders Code. In such a case third-country nationals through an irregular crossing by land, sea or territory at the external border of a Member State, have not obtained the right of residence in a Member State.

The scope of subjective application and the relative derogation takes into account what is established by the CJEU in the Affum case[25], thus directly underlining the space and time, the authorities crossing the external border according to letter a), Art. 2, par. 2 of the Return Directive which fall on third-country nationals detected by the authorities when they cross the external border irregularly and are at the same border.

Non-exhaustive situations do not belong to the category and appear irregularly upon arrival people who are arrested by the authorities because they have tried to enter the borders illegally. This category does not include irregular migrants, who are stopped at the external border and who have obtained a right in their own territory of the Member State where they seek asylum. Thus, the stay and the asylum application is rejected and is considered irregular and excluded in border cases.

The arguments are many, such as the category that falls within the asylum seekers where the border procedure has been denied

25CJEU, C-47/15, Affum of 7 June 2016, ECLI:EU:C:2016:408, published in the electronic reports of the cases, par. 96.

for four weeks. They are affirmative and admitted to the territory within the border procedure and according to what established art. 43. An exception is art. 2, par. 2, letter a) relating to the applicants. In this case, the border procedure provides for repatriation at the border, which is distinct from the case of repatriation at the border and the regime of an administrative expulsion that is applied to asylum seekers as subjects of the asylum procedure at the border[26].

Third country nationals are subject to the rejection of the border which is in the same line with Art. 14 SBC, as a response to all third country nationals under screening and control at the border and according to Art. 6, par. 1 of the same Code and as are provided by art. 6, par. 5, that is, the elements of refusal of entry.

The refusal of entry is rejected immediately towards the country of origin and provenance. According to par. 3 of Art. 14 SBC the appeal and the related decision of refusal of entry does not have a suspension effect. Par. 4 of the same provision highlighted that the border guards have monitored the third country national as an object considering that the rejection measure is not part of the territory of the same member concerned. Thus, the methods of rejection according to the former Art. 14SBC are part of Annex V of the relevant code. According to Art. 2, par. 1, letter b) of the Annex, the third-

26CESEDA, artt. L 352-1-L 352-9 (refus d'entrée au titre de l'asile).

country national whose entry has been refused by a carrier is obliged to transfer him to a third country where he has been transported to a third country. Thus, the authorities have taken the relevant measures respecting domestic law according to local circumstances and to prevent the illegal entry of rejected third-country nationals.

The SBC refers to the deception of non-entry as a procedure of art. 14 which highlights that the subject cannot move freely on its territory under a personal denial and movement. According to Art. 2, par. 2, letter a) of the Return Directive, national law allows the foreigner to be subject to Art. 14 SBC allowing thus a discretion to the Member States, where:

"(...) (a) they ensure that they are afforded treatment and a level of protection no less favourable than that provided for in Article 8, paragraphs 4 and 5 (limitation of the use of coercive measures), Article 9, paragraph 2, letter a) (postponement of removal), Article 14, paragraph 1, letters b) and d) (emergency health care and consideration of the needs of vulnerable persons) and Articles 16 and 17 (conditions of detention) and (b) respect the principle of non-refoulement (...)".

Therefore, the CJEU in the Affum case stated that art. 2, par. 2:

"(...) apply simplified national return procedures at their external borders, without having to follow all the stages in which the procedures provided for by the aforementioned Directive develop (...) be able to remove more rapidly third-country nationals detected while crossing those borders (...)"[27].

Asylum and migration according to the new pact

The new pact has an exceptional and residual nature, which follows asylum and migration. The new pact thus creates an integrated border procedure that carries out in the border and

27CJEU, C-47/15, Affum of 7 June 2016, op. cit., par. 73.

transit areas to the Member States in a manner consistent with the phases of arrival in their territory that carries out checks on people entering as a request for international protection and repatriation at the border. The new pact follows thus an integrated border procedure[28].

The three regulations that have regulated the border in an integrated manner bring to light a repatriation procedure at the border. The instruments of the fiction of entry lay the foundations for a regular admission regime that provides some pre-established phases that affect the enjoyment of rights, that is, personal freedom and removal.

(Follows): First phase of assessment

Take measures relating to a situation is a necessary step in order to pass the assessment phase, as it has been formalized in the procedure and the hotspot structures, according to the SBC (Jakulevičienë, 2022). The relevant regulations have distinguished the subjective and objective application. To assess according to the regulations is based on the category of third-country nationals who meet the entry conditions according to Art. 6 of the Regulation 2016/399, thus crossing the external border has not authorized those who have applied for

28Commission Staff Working Document, Accompanying the document, Proposal for a Regulation of the European Parliament and of the Council on asylum and migration management and amending Council Directive (EC)2003/109 and the proposed Regulation(EU)XXX/XXX [Asylum and Migration Fund] (COM(2020) 610 final), of 23 September 2020, SWD(2020) 207 final, 69-74.

international protection through border checks before they are directed to the appropriate procedure for third-country nationals who are illegally found in the territory of the Member States and are third-country nationals subjected to the external borders before the appropriate procedure.

The regulation is clarified with a different way from the SBC to the people who have followed the controls outside the border according to the pre-established times. Thus the subjects have submitted an application for protection to check the border provided by authorized subjects who enter the territory and who have the entry requirements according to the former art. 6SBC who submit the relative application. The Regulation does not prejudice that a person acquires the quality of applicant for protection who expresses the will to request the relative protection[29].

Subject for the relative checks according to Articles 8, 12, 14, 15, 16, 17, 18 for the preliminary check of the state of health, vulnerability, identity verification, recording biometric data, security check, is to filling in the relative form and following the appropriate procedure, i.e. the pre-established rules for applicants for protection and who are registered in a formal way and that the others will be subject to be removed.

Art. 6 referred to the relative authorization to remain in their territory states that:

29Recital 11, 15, art. 5(1), art. 11(1)(b).

"(…) third-country nationals are not authorised to enter the territory of a Member State. The provision provides that Member States shall lay down, in their national legislation, provisions aimed at ensuring that third-country nationals who are the subject of checks remain at the disposal of the competent authorities in order to prevent any risk of absconding as well as potential threats to internal security resulting from such absconding, or potential risks to public health that could result from such absconding (…)".

The detention of the places to be carried out is important as is the third country that receives the checks that refuse entry with a negative result.

The relevant regulation does not contain rules that are reserved for the detention of checks and that explains the modus that the Member States ensure the third-country national who cannot remain in their territory. A degree of restriction relating to the movement of the person is a subject deprived of personal freedom that limits the freedom of residents as well.

This is a position relating to recital no. 13 which is mandatory for the assessment of each case. The Member States thus detain the person subjected to checks except that they are applicable to the least coercive measures.

According also to art. 8, par. 1 the:

"(...) adequate and suitable place designated by each Member State, generally located at the external borders or in their vicinity or, alternatively, in other places within its territory (...) is seven days from the tracing in the external border area, from the disembarkation on the territory of the Member State concerned or from the presentation at the border crossing point (...)".

Applicants for international protection are identified as persons into the Reception Directive, which is applied together with other rules that are related to detention. Persons thus present the Reception Directive and the related rules on detention. Persons

have not submitted the relevant application for protection as well as according to Art. 8, par. 7 of the Regulation the relevant rules on detention where Directive no. 2007/115/EC detect the relevant investigations for third-country nationals who have not made the relevant application for international protection.

Art. 18 of the Regulation provides that the procedure for third-country nationals, who have not applied for international protection are addressed to the competent authorities to apply the procedures according to Directive no. 2008/115/EC.

Third-country nationals also make use, according to Art. 2, par. 2, lett. (a), of the Return Directive when they are part of:

"(…) apprehended or detected by the competent authorities in connection with the irregular crossing by land, sea or air of the external border of a Member State and who have not subsequently obtained an authorisation or a right to reside in that Member State (…). Checks, the person who has been subjected to them becomes the subject of a return or asylum procedure, in the course of which decisions are taken which may be subject to judicial review, or is the subject of a refusal of entry (…)".

The result of checks is not an object that can be contested, since there are no rules on the matter. The provision that refers to the outcome of checks leads to doubts that are in absence with the rules of protection and the violation of non-refoulement (Peers, 2024a).

The third-country national is thus an object that refuses entry according to the former Art. 14 SBC and repatriation according to the former Directive n. 2008/115.

(Follows): Second procedural stage for asylum and border

In the second asylum and border stage the procedure according to the Regulation has taken in consideration the third-country's national will to ask for protection. Art. 43 of the Regulation allows the Member States to be able to examine, control the border procedure according to the application in case the third-country national and the stateless person has not satisfied the entry conditions according to the former Art. 6 SBC.

This is a procedure that is based on the external border and the transit zone, as the external border is irregularly connected to the disembarkation of the territory of a Member State and to the search operation in order to help people in need of rescue according to Art. 44. The border procedure concerning the admissibility for an application is also part of the requirements relating to the application of the accelerated procedure pursuant to art. 42, par. 1, lett. from a) and g) to j) and par. 3, lett. b).

The Regulation thus applies the border procedure with a mandatory manner according to art. 45 and from what is provided for by art. 43, par. 1 as well as art. 42, par. 1, lett. c), f), j). So it applies the results of the investigations provided for by the relevant regulations starting from the discussion of an irregular passage of an external border and the landing on the territory of the state that followed the search and rescue at the time that the applicant had the intention in error to the

authorities to present information to false documents and/or not to leave information that is pertinent to the documents and/or that there are reasons where the applicant has made the identity documents, travel documents disappear to avoid the verification of an identity, citizenship. So the reasons considered for the applicant are connected with the danger to national security, public order for the Member States.

The times of the border procedure are shorter for the ordinary procedure respect the previous version according to ex art. 43, where the application must be made within five days following the relevant investigations and the decision in practice takes a period of time, which reaches twelve weeks according to Art. 51 of the regulation.

The checks according to art. 54 ask the applicant who is not authorized to enter the territory of the Member States and not to move to their own territory for reasons related to the health procedure. A rule that asks the resident, according to the proximity of the border, the degree of physical restriction that is imposed on those seeking protection. The detention of the border procedure is regulated by the Reception Directive according to art. 10, par. 4 thus granting the Member States the optional right to detain the applicant avoiding a chain of irregular border crossings, as well as the border procedure. Thus the detention of the applicant is justified as a reason that protects

first of all the screening of detention. Hence, determining the identity, citizenship and more, means to apply the border procedure. Such procedure is based on Art. 43 of the Regulation. Also in this case the evaluation must be made case by case.

The decision of detention allows the applicant to consider as unauthorized the territory that will be subject to a degree that restricts freedom of movement. The applicant will be authorized only when twelve weeks have passed, instead if a denial arrives in this phase the decision of repatriation follows the path of not authorized to enter its territory. Obviously the right to challenge the decision does not have a suspensive effect according to art. 68, par. 3 but it automatically implies to the applicant the right to remain before an appeal and as an exception unaccompanied foreign minors (Peers, 2024b). Also in this case the territory is valid as an unauthorized place.

(Follows): Third phase towards repatriation

The third phase is contrary to the previous ones which have to do with the non-right of admission but with that of repatriation at the relative border. The European institutions have decided to dedicate the relative regulation as an objective to simplify, harmonize, integrate the procedures to the Member States thus establishing a relative procedure for repatriation at the border. Art. 1 of the Regulation has established what is applied to

citizens of third countries, to stateless persons.

In this case, repatriation is not the same as expulsion, which was decided according to the former Directive no. 2008/115. This is a simplification of the procedure itself, where the time for repatriation at the border, the degree of restriction after the checks to the end of repatriation at the border and who remains as an unauthorized entrant and without freedom of movement, of circulation on the territory of a Member State is reduced. According to Art. 4 of the Regulation, a third-country national and/or a stateless person whose application for asylum at the border has been rejected is not authorized to enter the Member State of the interested party.

Par. 2 provides for repatriation at the border, realizing a period of time that reaches twelve weeks starting from the negative decision after the application for international protection and the third-country national can stay at a place of an external border and in a transit zone.

Art. 4, par. 5 allows to persons in repatriation a voluntary period of fifteen days except in specific cases, i.e. if it is a fear of absconding where the asylum procedure at the border is rejected due to its incorrectness and/or the person thus represents a danger to public order, national security for the Member States thus delivering a valid travel document for a process necessary to prevent absconding with immediate manner. Granting a

period for voluntary departure is not equivalent with the entry into the territory of the Member State.

Art. 5 of the Regulation imposes the measure of an instance according to the basis of an individual assessment in the case that does not resort to other less coercive measures. Thus, continues to detain the person who is in the state of detention and in the border procedure.

If, however, the person is not detained, the risk of absconding is permitted according to the Directive no. 2008/115 when a person hinders the preparation of the return and the removal procedure represents a danger to the national and public security of the country in which he is staying. The relative duration is approximately twelve weeks. This is a period that can be extended according to art. 6 when crisis situations occur for a further period of six weeks[30].

The Regulation in collaboration with the SBC and the relative refusal of entry based on art. 14 of the Code has inspired art. 4, par. 6 in case the Member State has applied the rejection according to the former art. 14 together with art. 2, par. 2, letter a) of the Return Directive and the protective treatment has been offered according to Art. 4, par. 4 of the Return Directive as well as in equivalent manner the rules that are relevant for the Regulation and in particular artt. 4, par. 2, letter and art. 5, par. 4. Thus the return and rejection procedure according to the

30See Art. 1, par. 4 of the new regulation.

former Art. 14 SBC refers to the category of third country nationals who have requested international protection through a border procedure that have received a denial of their application. The law is not discriminatory between the procedures. At the same time the state does not have the right to choose one or the other path to follow.

Art. 4, par. 6 has conditioned the relative application which immediately rejected the former Art. 14 SBC, in case the applicant denied his detention. This is in accordance with the standard of the Regulation on return to the border where the duration and the relative connection with the detention is precise for the person who has moved away and removed the relative discretion which is granted to the Member States which have applied Art. 14 SBC.

A "point" of further investigation from France

The French approach is also worth investigating, particularly in this topic and especially through the jurisprudence of the Conseil constitutionnel and the related decision n° 2023-863 DC of 25 January 2024 (Fargeaud, 2024; Lacaze, 2024)[31]. A ruling that was based on and tried to interpret the Loi pour contrôler l'immigration, améliorer l'intégration, adopted on 19 December

31Décision n. 2023-863 DC du 25 janvier 2024: https://www.conseil-constitutionnel.fr/decision/2024/2023863DC.htm

2023 and entitled Darmanin law[32], remained outside the logic of government of the judges and the far-right party (Desjobert, 2024). This is a ruling based on Art. 45 of the French constitution. The Darmanin law was made unconstitutional as cavaliers législatifs and deprived the relevant text under examination.

Conforming the text with the constitution has called into question an adoption of a provision where a bill has saved and given restrictive provisions for the rights of foreigners within a dispute for the entry, stay, removal of migrants by attributing competence in the matter to a single judge and not to a panel[33] where the appeal times for some decisions require the relative benefit for reception and the order administrative detention[34].

The Conseil constitutionnel has obtained the migratory matter according to the decision 2018-717/718 QPC[35] based on solidarity (Dyevre, 2017)[36] thus tracing the spirit of brotherhood,

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32 LOI n. 2024-42 du 26 janvier 2024 pour contrôler l'immigration, améliorer l'intégration: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000049040245

33 "(…) préjudice de l'application des articles 40 et 41, tout amendement est recevable en première lecture dès lors qu'il présente un lien, même indirect, avec le texte déposé ou transmis (…)".

34 Art. L. 131-7: "(…) moins que, de sa propre initiative ou à la demande du requérant, le président de la Cour nationale du droit d'asile ou le président de formation de jugement désigné à cette fin décide, à tout moment de la procédure, d'inscrire l'affaire devant une formation collégiale ou de la lui renvoyer s'il estime qu'elle pose une question qui le justifie, les décisions de la Cour nationale du droit d'asile sont rendues par le président de la formation de jugement statuant seul (…)"..

35 https://www.conseil-constitutionnel.fr/en/decision/2018/2018717_718QPC.htm

36 See in particular: "(…) art. L. 622-1 of the Code de l'entrée et du séjour des étrangers et du droit d'asile (CESEDA), which punishes with imprisonment of up to 5

which is no longer found in a French sentence[37].

The unconstitutionality according to Art. L. 622-4 did not provide that criminal immunity respected the movement of the foreigner to an irregular situation for humanitarian reasons. The observations highlight that the continuity of a government approach of the council mentioning the argumentative strategies as a theme of a margin of discretion attributed to irregular immigration and declaring that the constitution expands the categories of foreigners against expulsion and in admission to other countries[38].

The judge affirmed that:

"(...) principe non plus qu'aucune règle de valeur constitutionnelle n'assure aux étrangers des droits de caractère général et absolu d'accès et de séjour sur le territoire national. Les conditions de leur entrée et de leur séjour peuvent être restreintes par des mesures de police administrative conférant à l'autorité publique des pouvoirs étendus et reposant sur des règles spécifiques. Il appartient au législateur d'assurer la conciliation entre, d'une part, la

years and a fine of 30,000 euros anyone who, directly or indirectly, facilitates or attempts to facilitate the entry, circulation or irregular stay of a foreigner on French territory (…) art. 622-4 provides for various cases of exemption, establishing criminal immunity for all natural or legal persons who have assisted the foreigner, without any direct or indirect compensation (…) and this is the point whose conformity with the constitution is contested (…) refers only to assistance in irregular stay and not also to assistance in the circulation and entry of the foreigner (…)".

37According to par. 8: "(…) la liberté d'aider autrui, dans un but humanitaire, sans considération de la régularité de son séjour sur le territoire national (…)".

38See in particular L. 631-2 which is the object of expulsion and constitutes with imperative manner the security of the state and public safety provided and the art. L. 631-3 with the relative vi osti. It does not belong to the categories of this article those who are expelled and for appropriate behaviors and that harm fundamental interests of the state, due to the fear of terrorist attacks that constitute acts of provocation and discrimination, hatred, violence in front of persons and/or groups of persons. The art. 35 of the new Darmanin law has provided according to the arts. 631-2 and L. 631-3 of the CESEDA to a foreigner to be admitted ex novo to its territory according to the categories of these articles that are the object of expulsion decisions and due to definitive convictions for certain crimes.

prévention des atteintes à l'ordre public et, d'autre part, le respect des droits et libertés reconnus à toutes les personnes qui résident sur le territoire de la République. Parmi ces droits et libertés figurent la liberté d'aller et de venir, le droit au respect de la vie privée et le droit de mener une vie familiale normale (...)"[39].

These positions[40] confirm that the legislator has followed a balance between public order and the rights of immigrants, that is, foreigners, stating that:

"(…) thirty-three instances in which the Council balanced public order against rights, whether explicitly or implicitly (…) only two were struck down (…)" (Imbert, 2022).

Positions that spark debate on irregular immigration, thus promoting restrictive immigration policies for the rights of foreigners (Slama, 2018).

The Conseil constitutionnel noted that:

"(…) lutte contre l'immigration irrégulière participe de la sauvegarde de l'ordre public, objectif de valeur constitutionnelle"[41],

balance between this value and the rights of foreigners is the sole responsibility of the legislator, while the judge has the task of verifying that the balance is restored. This control seems to be limited to a minimal "damage reduction", through bare and mostly formalistic reasoning, in line with the French legal tradition. The legislative framework has been subject to 133 amendments in less than ten years, while the Ministry of the Interior tends to reaffirm its priorities through specific circulars, without designing a global strategy. In contrast to this reiteration

39Décision n. 2018-717/718 QPC, par. 9: https://www.conseil-constitutionnel.fr/decision/2018/2018717_718QPC.htm

40Par. 10 of the sentence affirmed that: "(…) appartient au législateur d'assurer la conciliation entre le principe de fraternité et la sauvegarde de l'ordre public (…)".

41Décision n. 2023-863 DC, par. 140.

of ministerial instructions, the administrations and jurisdictions responsible for managing people in irregular situations struggle to carry out their activities (Cour de Comptes, 2024).

In fact, the Conseil constitutionnelle has tried to reduce the margins of decision n° 2023-863 DC with regard to the principles based on international law norms for the protection of foreigners, the Geneva Convention and the ECHR. Therefore, the Conseil has tried to exclude from its discursive process the principles and international conventions as a parameter of constitutional control thus expressing the decisions that are in conformity with the relevant provisions in the field of migration policy (Imbert, 2022).

It is noted that the balances are difficult in the sector and especially the relationships between judge and legislator. Such delicacy in the political forces threatens the legitimacy of the Conseil as state powers. The sentence n° 2023-863 DC has perhaps caused damage to the Conseil and for the protection of borders. Political choices are open for the near future where strategies are needed:

"(...) tenter de faire oublier le vote de ses élus avec l'extrême droite et jeter en pâture les élus LR (…)" (Le Monde, 2024).

These are choices that perhaps also go beyond the European process and what other European countries are doing to make people understand that immigration is now a non national or European but global phenomenon.

Concluding remarks

The new regime of admission, repatriation for asylum and generally of the immigration sector in the European context began its history at an international level through the international protection that a person requests and pursuant to the discretion that a state requests to its territory.

The obligations, the limits, the discretions in the sector as strategies have put in the forefront the rejection of foreigners despite their physical presence. Such strategies justified the application of a European regime where through the jurisprudence of the ECtHR have condemned the functional system of a jurisdiction of the borders through fictions of extraterritoriality and non-presence.

It is accepted that the states can apply a relative regime for the detention of migrants who have not authorized entry into the territory. According to the status of unauthorized entrants, the admission to the territory of a physical person in the border is an element indicated to legislative instruments. Thus, the new pact makes border procedures to have a mandatory nature, formulating in a precise manner a general normalization of the relationship that exists between norm and exception in relation to border procedures.

Admission to the territory leaves to the European legislator a derogatory regime that reduces the protection that is applied to the human rights of migrants and the people who are next to them. Thus, considerations are elaborated having to do with the restriction of personal freedom of migrants not authorized to enter a territory.

The relevant regulations include a new discipline divided into phases. Many difficult points are however still present and a long way to go to understand certain things is needed. The assessment of applicants for protection and detention that is applied to people in need allows third-country nationals to not show their will to present the relevant application and to immediately find themselves on the road to repatriation. The absence of a provision on detention legitimises the assessments and refers to the detention of applicants for international protection as a recital where it is limited to a legal basis of hotspot procedures to overcome the ambiguities relating to personal freedom for migrants.

The new asylum and border procedure as well as repatriation at the border do not reduce the discretion of the state to do so. The procedure regulation and the Reception Directive have thus respected what has been regulated by the former Art. 43 of the Directive as a restriction that has imposed on the protection seeker not to authorize entry. As well as reflections that extend

the repatriation at the border and the personal freedom of citizens to third countries are noticed.

The detention continues to respect the principles of proportionality, necessity, application and the assessment of case by case separately as Regulation leaves a margin of freedom on the modus, the forms of border procedures and ignoring the ambiguous formulas where certain limits are needed for the freedom of movement of migrants not accepted precisely their own modalities.

The related proposals repeat the references that prevent entry into the territory of a third country as an obligation where the applicant for protection according to a border stay with an approximate way brings the risk of detention, to hybrid forms that limit the personal freedom of third country nationals towards de facto personal freedom measures such as zone centers that regulate hotspot structures.

International protection and removal also respects the principle of non-refoulement and the regulation which allows third-country nationals to challenge the entry verifications. The provision of a general mechanism to assess, control fundamental rights in a sufficient and ensuring respect for the right to asylum allows within the scope of protection of human rights a strong impetus in the common European asylum system as well as to the applicant where according to the CJEU:

"(...) a situation of irregular stay in that territory and regardless of the chances of success of such an application[42] (...) rejection at the external borders in the absence of an assessment of the merits of the requests for protection are contrary to Union law and the principle of non-refoulement (...)" (Jakulevičienë, 2024)[43].

The extension of the use of the asylum procedure that follows the repatriation at the border is an automatic right to remain in one's territory and a denial of protection for border cases in times of guarantees and protection asylum seekers participate in an increase of subjects who are directed to a quality of procedure thus expanding the standard decisions of an assessment of needs of a subjective nature together with vulnerable people (Chetail, Ferolla, Do Valle, 2024).

Normalizing accelerated procedures for asylum and rejecting the entry to the EU borders make a double standard to the treatment of the law of the Union, deepening thus the rights that are subject to the ordinary procedures, attributable to third countries not authorized and to protection seekers with irregular stay at the border.

Admitting to a European territory a third country citizen now requires a formalism where after several years the European space opens now a new chapter perhaps more positive than that of the past with more accumulated experiences and with maturity to roads that inaugurate a modus interpretandi of new

42CJEU, C-392/22, X v. Staatssecretaris van Justitie en Veiligheid of 29 February 2024, ECLI:EU:C:2024:195, published in the electronic reports of the cases, par. 51.

43CJEU, C-392/22, X v. Staatssecretaris van Justitie en Veiligheid of 29 February 2024, op. cit., par. 53.

norms and a more complete status of immigration and asylum policy.

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